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No. 05-1575

In the Supreme Court of the United States

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

JEFFREY TIMOTHY LANDRIGAN, AKA BILLY PATRICK WAYNE HILL

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

GIOVANNA SHAY
CHRISTOPHER LASCH
Yale Law School
Supreme Court Advocacy Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

PAMELA HARRIS
NACDL Amicus Committee
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

Counsel for Amicus Curiae

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BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with over 10,000 national members and more than 28,000 affiliate members from every State.[1] Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. In furtherance of that mission, NACDL frequently files *amicus curiae* briefs in this Court in cases involving capital punishment (see, *e.g.*, *Carey* v. *Musladin*, No. 05-785 (Dec. 11, 2006); *Gonzalez* v. *Crosby*, 545 U.S. 524 (2005); *Dodd* v. *United States*, 545 U.S. 353 (2005); *Rhines* v. *Weber*, 544 U.S. 269 (2005); *Pliler* v. *Ford*, 542 U.S. 225 (2004)), and in cases implicating a criminal defendant's right to a fair trial (see, *e.g.*, *Crawford* v. *Washington*, 541 U.S. 36 (2004)).

The questions presented in this case relate directly to the duties of defense counsel in capital cases. NACDL has unique expertise with respect to these issues as well as a strong interest in their appropriate resolution.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long recognized the right of a capital defendant to introduce a wide range of mitigation evidence in support of his argument against the death penalty. See *Kansas* v. *Marsh*, 126 S.Ct. 2516, 2525 (2006). The Court also has recognized and enforced a corresponding constitutional duty of defense counsel to perform a reasonable investigation to identify mitigation evidence that could potentially lessen a defendant's punishment. *Wiggins* v. *Smith*, 539 U.S. 510, 521-22 (2003); *Williams* v. *Taylor*, 529 U.S. 362, 395 (2000). Given the critical role of mitigating circumstances in the sentencing process, proper performance of this duty literally can mean the difference between life and death for the defendant.

This case involves respondent's claim that his counsel's investigation of mitigating circumstances was so inadequate that it constituted ineffective assistance of counsel under the standard of *Strickland* v. *Washington*, 466 U.S. 668 (1984). With respect to the first prong of the *Strickland* standard, petitioner did not seek review of the court of appeals' determination that respondent had presented a colorable claim that his counsel's investigation fell below prevailing professional norms. Petitioner argues instead that respondent should be denied an evidentiary hearing because he supposedly waived his right to present *any* mitigation evidence, and that waiver excuses any ineffective assistance by respondent's counsel in failing to conduct a reasonable investigation.

That argument ignores the well-settled principle that waivers of criminal trial rights guaranteed by the Constitution are valid only if they are knowing, voluntary, and intelligent. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). A defendant cannot knowingly and intelligently waive presentation of any and all mitigation evidence without his lawyer's informed advice regarding the range of potentially mitigating evidence that might be available to him for introduction in the sentencing process and its potential impact on the sentencing deter-

mination. The en banc court of appeals properly – and unanimously – determined that such informed advice can be given only after the lawyer has conducted the reasonable investigation required by this Court's decisions.

The novel waiver standard advocated by petitioner requires no knowledge of the mitigation evidence that might be available. It also ignores the reality that capital defendants commonly are among the least capable members of society and, as a class, are most unlikely to be able to make intelligent decisions based only on general information about the mitigation process. They need advice of counsel based on the reality of their particular case in order to have any chance of comprehending the choices available to them in a proceeding that will determine whether they will live or die. The waiver standard should support, rather than undermine, the important values protected by the Sixth and Eighth Amendments.

With respect to *Strickland*'s prejudice prong, the court of appeals correctly concluded that respondent's showing was sufficient to require an evidentiary hearing. The anemic investigation by respondent's counsel failed to unearth a number of mitigating factors that weigh against a death sentence, including proof of respondent's "organic brain dysfunction," his exposure to alcohol and drugs in utero, his abandonment by his birth parents, his biological family's history of violence, and his own potential genetic predisposition to violence. The reaction of nine judges below to this evidence – as well as empirical studies of jury behavior – provide strong support for the conclusion that respondent has established a colorable claim of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

ARGUMENT

RESPONDENT IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Recognizing that "death is a punishment different from all other sanctions in kind rather than degree," this Court has held that the Constitution requires an individualized determination that death is the appropriate sentence. *Woodson* v. *North Carolina*, 428 U.S. 280, 303-04 (1976). "Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background * * * may be less culpable than defendants who have no such excuse." *Wiggins*, 539 U.S. at 535 (quoting *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989)).

The Court accordingly has held that the Eighth Amendment requires "a broad inquiry into all relevant mitigating evidence to allow an individualized determination" of the appropriateness of the death penalty. *Buchanan* v. *Angelone*, 522 U.S. 269, 276 (1998). The sentencing process must "permit [the judge or jury imposing sentence] to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Marsh*, 126 S.Ct. at 2524-25. The judge or jury pronouncing sentence may "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original).

To vindicate this critically important right, the Court has reaffirmed repeatedly in recent years that defense counsel has a constitutional duty to perform a reasonable investigation in order to identify mitigation evidence that might lessen the defendant's punishment. *Wiggins*, 539 U.S. at 522; *Williams*,

529 U.S. at 395-96. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins*, 539 U.S. at 521.

This case involves a claim that respondent's counsel failed to conduct the reasonable investigation of mitigating circumstances required by the Constitution. Such claims are analyzed under the familiar two-part *Strickland* test, which requires both deficient performance by counsel, as measured against "an 'objective standard of reasonableness,' 'under prevailing professional norms'" and prejudice to the defendant from that deficient performance. *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 688).

The issue here is not whether respondent should prevail on his ineffective assistance claim, but only whether respondent has adduced sufficient evidence on each prong of the *Strickland* standard to justify an evidentiary hearing in the district court.

This Court has made clear that an evidentiary hearing is required whenever the habeas applicant has advanced a colorable claim and resolution of a factual dispute is necessary for a determination regarding the habeas applicant's claim. *Townsend* v. *Sain*, 372 U.S. 293, 312 (1963) ("allege[d] facts which, if proved, would entitle [the habeas applicant] to relief"); cf. *Miller-El* v. *Cockrell*, 537 U.S. 322, 327 (2003) (denial of certificate of appealability under 28 U.S.C. § 2253 improper because "jurists of reason could conclude that the issues presented are adequate to deserve encouragement to proceed further").[2] That standard is clearly satisfied here.

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[2] This is not a case in which 28 U.S.C. § 2254(e)(2) bars an evidentiary hearing, because the record shows that respondent pursued his claims diligently in state court. Pet. App. A8.

A. An Uninformed Waiver Cannot Excuse A Failure By Defense Counsel To Conduct The Constitutionally-Required Investigation Of Mitigation Evidence.

The certiorari petition in this case did not seek review of the unanimous determination of eleven judges below that respondent presented a colorable claim of deficient performance by his counsel. The majority stated that "counsel did little to prepare for the sentencing aspect of the case," that "the initial investigation *did* reveal potential mitigation evidence, but that evidence was not developed," and that respondent accordingly had "made a colorable claim that he did not receive effective assistance of counsel in his sentencing." Pet. App. A10, A11, A7 (emphasis in original). The dissenting judges agreed "with the majority's conclusion that counsel's limited investigation of [respondent's] background fell below the standards of professional representation." *Id.* at A22 (Bea, J., dissenting, joined by Callahan, J.).

Petitioner instead advances a waiver theory: respondent supposedly waived his right to present *any and all* mitigation evidence and that waiver excused any deficient performance by counsel under *Strickland*, rendering an evidentiary hearing unnecessary.

The court of appeals relied on two independent grounds in rejecting petitioner's position. First, it held that respondent did not intend to waive presentation of all mitigation evidence, but only of the two types of mitigation evidence described by his counsel. Pet. App. A14-A15. Second, it held that even if respondent had intended to waive his right to introduce *any* mitigation evidence, respondent proffered evidence sufficient to require an evidentiary hearing on his claim that his waiver was ineffective because it was not knowing and intelligent. *Id.* at A17.

We focus on the second aspect of the court of appeals' holding. Even if petitioner can show that the court of appeals erred in its determination regarding the scope of respondent's

waiver – and we believe its determination should be upheld given the record in this case – the court of appeals was plainly correct in concluding unanimously that there is sufficient evidence to necessitate a hearing concerning the effectiveness of the waiver.

The standard for waiver of criminal trial rights guaranteed by the Constitution is well-established – the waiver must be knowing, intelligent, and voluntary. Substantial evidence indicates that respondent's waiver could not satisfy this standard because respondent knew nothing about the range of potential mitigation evidence to which the waiver supposedly applied. We submit that a capital defendant needs the advice of counsel, informed by counsel's reasonable investigation of mitigating circumstances, in order to make a knowing and intelligent waiver. Because there is strong evidence that the waiver here did not satisfy that standard, the court of appeals properly ordered an evidentiary hearing.

1. A Capital Defendant's Waiver Of The Right To Present Any Mitigation Evidence At Sentencing Is Effective Only If It Is Knowing, Intelligent, And Voluntary.

"'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights"; to be effective, a waiver must be knowing, intelligent and voluntary. *Zerbst*, 304 U.S. at 464 (citation omitted). This standard governs any decision by a defendant "to forego a right constitutionally guaranteed to protect a fair trial." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 236 (1973). The Court has applied *Zerbst* "in many contexts where a State bears the burden of showing a waiver of constitutional criminal procedural rights." *Minnick* v. *Mississippi*, 498 U.S. 146, 159-60 (1990) (Scalia, J., dissenting). See, *e.g.*, *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969) (right to trial by jury; to be free from compelled self-incrimination; and to confront adverse witnesses); *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966) (right to

confront adverse witnesses); *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 275-80 (1942) (right to trial by jury).

As with these other constitutional rights, the *Zerbst* standard here must take account of the specific facts and circumstances in which the waiver issue occurs. Accordingly, we turn next to a discussion of the context in which the issue of waiver of presentation of mitigation evidence typically arises.

2. *The Standard For Determining Whether A Waiver With Respect To Mitigation Evidence Is Knowing And Intelligent Should Reflect The Practical Realities Of The Death Penalty Context.*

Capital defendants as a group are among the least capable – and most damaged – members of American society.[3] They typically are poor, uneducated, of below average intelligence, psychologically disturbed and/or mentally ill, and products of violent family backgrounds. Defendants with these characteristics are likely to have considerable difficulty understanding the concept of mitigation evidence, the multiplicity of forms that mitigation evidence may take, and the significance of particular evidence in sentencing determinations. This reality should inform the Court's decision regarding the circumstances in which a defendant may make an effective waiver.

The mean IQ of death-row inmates is well below average, and roughly 30% are, at best, borderline mentally re-

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[3] The best summary of the scholarly literature on this subject is Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 Behav. Sci. & Law 191 (2002) (hereinafter "Cunningham & Vigen 2002"). This paper attempts to draw broader conclusions from the available demographic data, prison data, and 13 clinical studies that have been conducted on particular subsets of the death-row population.

tarded.[4] More than 52% have less than a high-school education, and studies show that those with some high-school experience have a functional literacy well below their grade level.[5] One detailed assessment of 44 death-row inmates in Mississippi, for example, concluded that, on average, the inmates scored at roughly the 10th percentile in terms of intelligence (as measured by "verbal IQ"),[6] with 84% at or below the 6th grade level in reading comprehension.[7] In addition to their intellectual handicaps, capital defendants are also overwhelmingly poor – approximately 90% are indigent at time of arrest.[8]

Death row inmates typically have suffered extensive physical and sexual abuse.[9] One study of 16 inmates found that every single one had suffered violence in the home dur-

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[4] Cunningham & Vigen 2002, *supra* note 3, at 199; R.L. Frierson, D.M. Schwartz-Watts, D.W. Morgan, et al., *Capital Versus Noncapital Murderers*, 26 Journal of the American Academy of Psychiatry & Law 403, 406 (1998).

[5] Bureau of Justice Statistics, U.S. Department of Justice, *Capital Punishment, 2004*, Bulletin 6 (November 2005, revised February 1, 2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf; Cunningham & Vigen 2002, *supra* note 3, at 199-200.

[6] Mark P. Cunningham & Mark P. Vigen, *Without Appointed Counsel in Capital Postconviction Proceedings: The Self-Representation Competency of Mississippi Death Row Inmates*, 26 Crim. Justice and Behav. 293, 300 (1999) (hereinafter "Cunningham & Vigen 1999").

[7] *Id.* at 301.

[8] Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L. Rev. 330, 333 (Fall 1995); see also Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 Santa Clara L. Rev. 547, 563 (1995).

[9] Cunningham & Vigen 2002, *supra* note 3, at 202.

ing childhood,[10] and a separate study found evidence of "extraordinary physical and/or sexual abuse" in 13 out of 15 individuals examined.[11] A broader study of individuals awaiting trial or sentencing for murder found similar results – 84% had documented histories of physical abuse, and 32% had histories of sexual abuse.[12] Additional examinations have shown that large numbers of death row inmates have suffered severe head injuries, which often lead to significant neurological impairment.[13] High rates of substance abuse among the parents of such inmates – as high as 57%, according to one Mississippi study – undoubtedly play a role in these patterns of violence and mistreatment.[14]

Mental health problems also are frequent among capital defendants. The leading survey of academic research on death row inmates concluded that all studies that have investigated the psychological functioning of such inmates have found high rates of psychological disorders.[15] Precise estimates of the prevalence and extent of mental illness vary, despite general agreement that the scope of the problem is wide. One study of death-row inmates estimates that 5-10%

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[10] D. Freedman & D. Hemenway, *Precursors of Lethal Violence: A Death Row Sample*, 50 Social Science & Medicine 1757, 1758 (2000).

[11] M. Feldman, K. Mallouh, & D.O. Lewis, *Filicidal Abuse in the Histories of 15 Condemned Murderers*, 14 Bull. Am. Acad. Psych. & Law 345, 348 (1986).

[12] P. Blake, J. Pincus, & C. Buckner, *Neurologic Abnormalities in Murderers*, 45 Neurology 1641, 1644 (1995).

[13] D. O. Lewis, J. H. Pincus, M. Feldman, et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 Am. J. Psych. 838, 840 (July 1986); Cunningham & Vigen 1999, *supra* note 6, at 305-306; Freedman & Hemenway, *supra* note 10, at 1762.

[14] Cunningham & Vigen 1999, *supra* note 6, at 305.

[15] Cunningham & Vigen 2002, *supra* note 3, at 200.

of such inmates are "seriously" mentally ill.[16] Specific conditions among these inmates vary, though paranoia and schizophrenia seem especially common.[17] In many cases, these mental health deficiencies have been traced to physiological dysfunction and abnormalities in the brain.[18]

The combination of limited intellectual ability, histories of physical and sexual abuse, and mental health problems suggest that in many cases capital defendants have limited capacity to make rational choices concerning their own defense strategies. This point is underscored by the phenomenon of death-penalty "volunteers" – capital defendants who actively bring on their own death sentences by either asking for execution or refusing to mount an effective defense or appeal.[19] According to one study, approximately 12% of those executed between 1977 and 2003 have been willing volunteers.[20] Of these, approximately 77% suffered from mental illness.[21]

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[16] Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 Catholic U. L. Rev. 1169, 1192 (2004-2005).

[17] Freedman & Hemenway, *supra* note 10, at 1761-62; Cunningham & Vigen 1999, *supra* note 6, at 305; Blake, Pincus, & Buckner, *supra* note 12, at 1643-44.

[18] Lewis, Pincus, Feldman, et al., *supra* note 13, at 840-44; Blake, Pincus, & Buckner, *supra* note 12, at 1642-44 & 1645-46; Freedman & Hemenway, *supra* note 10, at 1762.

[19] For the best overviews of this phenomenon, *see* G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness, and the Propriety of Third Party Intervention*, 74 J. Crim. L. & Criminology 860 (1983); John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 Mich. L. Rev. 939 (March 2005).

[20] Blume, *supra* note 19, at 939-940.

[21] *Id.* at 962-63, 989-96; see also C. Lee Harrington, *Mental Competence and End-of-Life Decision Making: Death Row Volunteer-*

Significantly, defendants who initially "volunteer" frequently change their minds.[22] The changeability of "volunteer" decisions reinforces the conclusion that capital defendants can make intelligent waiver decisions only if they are fully informed of the potential mitigating circumstances and their import – and in a way that they can comprehend.

The difficult personal circumstances of capital defendants of course do not excuse criminal activity. But they do establish that these defendants find it very difficult to understand the nature, purpose, and potentially varied sources of mitigation evidence – particularly in cases, such as this one, in which some of the evidence may be complex and scientific in nature.[23]

3. A Knowing, Intelligent, And Voluntary Waiver Of Presentation Of All Mitigation Evidence Can Occur Only If The Defendant Has Received The Advice Of Counsel Based On Counsel's Reasonable Investigation.

Given the crucial role that mitigation evidence plays in the capital sentencing process, the wide variety in the types of evidence that may be used to argue for mitigation, and capital defendants' likely difficulty in comprehending the role and scope of mitigation evidence, the Court should require that a defendant receive the advice of counsel, based on that lawyer's reasonable investigation, before the defendant can waive presentation of all mitigation evidence. That is the

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ing and Euthanasia 29 J. of Health Politics, Policy and Law 1109, 1132-34 (December 2004).

[22] Bonnie, *supra* note 16, at 1189-92; Richard W. Garnett, *Sectarian Reflections on Lawyers' Ethics and Death Row Volunteers*, 77 Notre Dame L. Rev. 795, 801 (2002); Welsh S. White, *Defendants Who Elect Execution*, 48 U. Pitt. L. Rev. 853, 854-55 (1986-1987); Blume, *supra* note 19, at 940.

[23] See generally Amended Memorandum Regarding Merit Claims, J.A. at 126-27.

only way to ensure that a defendant's waiver truly will be knowing and intelligent and that the waiver standard will not be invoked routinely as a means of circumventing the investigation requirement.

A wide variety of information may constitute powerful mitigation evidence depending on the facts of a particular case.[24] Some recognized mitigating factors include family history (*Eddings* v. *Oklahoma*, 455 U.S. 104, 114 (1982)); underdeveloped intellect and immaturity (*Burger* v. *Kemp*, 483 U.S. 776, 789 n.7 (1987)); favorable prospects for rehabilitation (*Miller* v. *Wainwright*, 798 F.2d 426, 430-31 (11th Cir. 1986), vacated on other grounds, 480 U.S. 901 (1987)); poverty (*Armstrong* v. *Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987)); military service (*Laws* v. *Armontrout*, 863 F.2d 1377, 1389-90 (8th Cir. 1988)); cooperation with authorities (*Foster* v. *Strickland*, 707 F.2d 1339, 1347 (11th Cir. 1983)); character (*Simmons* v. *South Carolina*, 512 U.S. 154, 163 (1994)); prior criminal history (*ibid.*); mental capacity (*ibid.*); incapacity due to drugs or alcohol (*Gore* v. *Dugger*, 933 F.2d 904 (11th Cir. 1991) (per curiam), cert denied, 502 U.S. 1066 (1992)); and good behavior while awaiting trial (*Skipper* v. *South Carolina*, 476 U.S. 1, 4-5 (1986)).

It is inconceivable, particularly in view of all of the disabilities just described, that capital defendants generally would be able to absorb the large number of categories of possible mitigation evidence, determine which of those types of evidence might be available in a particular case, and assess how that evidence might affect the sentencing decision maker – including the possible interactions of various types of mitigation evidence with each other and with the evidence introduced during the first phase of the trial. The defendant might

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[24] See generally Craig M. Cooley, *Mapping The Monster's Mental Health And Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists*, 30 Okla. City U. L. Rev. 23, 43-48 (2005).

not be aware of much of the evidence that might be available to him; he almost certainly would have no idea of its potential impact on the sentencing determination. And, without undertaking an investigation, his counsel likely would not be able to provide any useful advice on these questions. Following investigation, counsel can make the possibility of mitigation real to her client by explaining it in terms of a defendant's own life history. That will equip the defendant to make an informed decision regarding the presentation of such evidence.

Moreover, some potentially mitigating evidence is complex and scientific in nature (see generally J.A. 126-27), and may require substantial development during counsel's investigation. As in the instant case, a capital defendant may be completely unaware that such evidence is available to him.

Finally, a number of categories of well-recognized mitigation evidence relate to personal matters that potentially are very embarrassing to the defendant. As the American Bar Association *Guidelines for the Appointment and Performance of Death Penalty Cases* puts it:

> Counsel should bear in mind that much of the information that must be elicited for the sentencing phase investigation is very personal and may be extremely difficult for the client to discuss. * * * Obtaining such information [like childhood sexual abuse] typically requires overcoming considerable barriers, such as shame, denial, and repression, as well as other mental or emotional impairments from which the client may suffer.[25]

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[25] American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Sec. 10.7 cmt. (2003), *available at* http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf.

One veteran capital litigator has noted that mitigation evidence often includes the "darkest, most shameful and intimate secrets of the client's family."[26]

Capital defendants may be unable or unwilling even to consider, let alone to assess accurately, the possible beneficial impact of such information. Often they are not aware of the information; even if they are, they may not volunteer it to their counsel to obtain advice regarding its significance. A defendant may so clearly perceive the down-side of presenting deeply personal evidence that he may decide impulsively against presentation. Counsel must be aware of the mitigating information that may be available in order to advise the defendant regarding the potentially beneficial effects of presentation of the information – that it may be the defendant's *only* chance to avoid death – so that the defendant can balance those benefits against the more obvious adverse consequences.

This Court should account for the difficult realities facing death penalty defendants by ensuring that defendants may waive presentation of mitigation evidence only if they are armed with the relevant critical information – advice from their attorney based on the results of his reasonable investigation. That will ensure that a defendant can make an informed decision with respect to what is, quite literally, a life-and-death decision.

This approach is consistent with the Court's recognition in *Hill* v. *Lockhart*, 474 U.S. 52, 58 (1985), that ineffective assistance of counsel in conjunction with a defendant's decision to waive the jury trial right by pleading guilty may render that waiver ineffective under the *Zerbst* standard. A number of lower courts have relied on *Hill* in holding that a

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[26] Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, The Champion (Jan./Feb. 1999), *available at* http://www.nacdl.org/public.nsf/ChampionArticles/99jan04?-OpenDocument.

guilty plea may be vitiated if counsel conducted a constitutionally inadequate investigation prior to advising the defendant with respect to the plea. See, *e.g.*, *Dando* v. *Yukins*, 461 F.3d 791, 800 (6th Cir. 2006) ("the failure to investigate undermined the knowing and voluntary nature of [the defendant's] plea"); *United States* v. *Kauffman*, 109 F.3d 186 (3d Cir. 1997); *Agan* v. *Singletary*, 12 F.3d 1012, 1018 (11th Cir. 1993) (even though defendant wished to plead guilty, "counsel must still make an independent examination of the facts and circumstances and offer an informed opinion to the accused as to the best course to follow"); *Ex Parte Del Briggs*, 187 S.W. 3d 458, 470 (Tex. Crim. App. 2005); *State* v. *Henderson*, 322 Mont. 69, 76 (2004); *State ex rel. Strogen* v. *Trent*, 196 W. Va. 148, 155 (1996). The same principle should apply to the critical decision whether to waive of presentation of mitigation evidence.

Of course, as this Court has made clear, the attorney's duty to investigate is subject to reasonable limits. The investigation of potential mitigation evidence that an attorney must undertake is the investigation that is reasonable under the circumstances. "'[S]trategic choices made after less than complete investigation are reasonable'" if "'reasonable professional judgments support the limitations on investigation.'" *Wiggins*, *539* U.S. at 533 (quoting *Strickland*, 466 U.S. at 689). See also *Blanco* v. *Singletary*, 943 F.2d 1477, 1500 (11th Cir. 1991) (holding counsel ineffective for failing to conduct a reasonable investigation because counsel's failure "was not a result of a tactical choice"); *Horton* v. *Zant*, 941 F.2d 1449, 1462 (11th Cir.1991) (finding a strategic decision impossible where trial counsel failed to "investigate his options and make a reasonable choice between them"). The approach that we propose does not alter the attorney's obligation; it simply ensures that the defendant's decision will be informed by the views of his lawyer based upon the results of the reasonable investigation.

Some lower courts have concluded that a colloquy between the court and the defendant can provide the basis for a knowing and intelligent waiver in the absence of a reasonable investigation by counsel; others have refused to find an effective waiver absent a reasonable investigation by counsel.[27] We submit that, in the absence of advice of counsel based on a reasonable investigation, an in-court colloquy is not sufficient to constitute an effective waiver.

A colloquy at most could apprise the defendant of the general purposes of mitigation evidence and explain in the abstract how such evidence may affect sentencing decisions. By definition, a generic colloquy cannot provide a defendant with any sense of how particular mitigation evidence may affect his particular case. Given the capital defendant's situation and the likely individual characteristics of these defendants, it is highly unlikely that a defendant presented with abstract information will be able by himself to make a judgment about the appropriate decision. He needs the advice of counsel, based on the information gleaned from counsel's reasonable investigation, in order to make a knowing and intelligent judgment about this very critical issue.

Moreover, there is a danger that in-court colloquies could be used as a convenient means of avoiding the sometimes resource-intensive process of conducting investigation and rendering professional advice – especially in view of the severe practical limitations on the defense. Approximately 90% of capital defendants are indigent, and as a result rely upon the state to provide them with defense counsel.[28] Un-

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[27] Compare, *e.g.*, *Zagorski v. State*, 983 S.W.2d 654, 659-60 (Tenn. 1998) (defendant can make knowing, intelligent, and voluntary waiver in the absence of investigation) and *Battenfield v. Gibson*, 236 F.3d 1215, 1229-33 (10th Cir. 2001) (waiver in the absence of investigation was not knowing or intelligent).

[28] Vick, *supra* note 8, 333-34.

fortunately, those systems often do not provide the resources needed to develop an appropriate defense.

For example, Congress in the 1990s mandated an hourly rate of $125 for defense attorneys in *federal* capital cases, because it believed that level of compensation was necessary to ensure competent representation. See 18 U.S.C. § 3599 (g)(1).[29] The most recent comprehensive study of hourly fees paid to private attorneys representing *state* capital defendants, conducted in 2003, found that the rates paid in all or parts of 13 States were set at *less than half the federal rate*, and in some states total fees were capped at less than $13,000 for an entire capital case.[30]

The same dearth of resources extends to funds for investigating mitigating circumstances and retaining outside experts. In the Florida's First Judicial District, for example, indigent defendants are permitted to spend only $500 on investigators for the entire capital trial, with an additional $625 available for a psychological expert.[31] Indeed, one possible

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[29] A subcommittee of the Judicial Conference of the United States found this rate to be minimally adequate when it was set more than eight years ago. Subcommittee on Federal Death Penalty Cases, Committee Defender Services, Judicial Conference of the United States, Report, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Death Penalty Representation* (1998), *available at* http://www.uscourts.gov/dpenalty/-1COVER.htm.

[30] American Bar Association Information Program & The Spangenberg Group, *Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial: A State-by-State Overview, 2003*, Table 1-11 (Apr. 2003), *available at* http://www.abanet.org/-legalservices/downloads/sclaid/indigentdefense/compensation-ratescapital2002-narrative.pdf.

[31] ABA Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report* 156 (Sept. 2006), *available at*

explanation for the anemic investigation of mitigating circumstances in the present case is the $350 ceiling on funds available to defense counsel for that purpose.[32]

The Court's decisions with respect to ineffective assistance of counsel claims provide important guidance for lawyers representing capital defendants regarding the contours of their professional obligations. Allowing a pro forma colloquy to substitute for advice of counsel based on a reasonable investigation, combined with these practical realities, threatens to produce a regime in which colloquies become the rule and reasonable investigations the exception, notwithstanding the critical role that mitigation evidence plays in ensuring fair and accurate administration of the death penalty.

Moreover, although the Court's focus under the Sixth and Eighth Amendments is ensuring appropriate protection for the defendant's rights to effective representation and to be free of cruel and unusual punishment, the facts we have just discussed implicate broader concerns as well. Americans justifiably are proud of our justice system, and the values of fairness and equal treatment that it embodies. This Court should not sanction a legal regime more likely to produce results inconsistent with these values and therefore diminish citizens' respect for the entire judicial system.

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As the en banc court of appeals unanimously concluded, respondent has made a sufficient showing to require an evidentiary hearing on whether the waiver here was effective.

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http://www.abanet.org/moratorium/assessmentproject/florida/FloridaReportEmbargoed9.13.doc; see also ABA Death Penalty Moratorium Project and the Alabama Death Penalty Assessment Team, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* 112-16 (June 2006), *available at* http://www.abanet.org/moratorium/assessmentproject/alabama/finalreport.doc; Vick, *supra* note 8, at 392.

[32] J.A. 246-47 (Declaration of Mickey McMahon).

Petitioner cannot dispute before this Court the court of appeals' holding that respondent presented enough evidence to warrant a hearing on the adequacy of his counsel's investigation. Because a waiver of all mitigation evidence cannot be knowing and intelligent unless the defendant has the benefit of advice of counsel based on a constitutionally-adequate investigation, that showing also is sufficient to call into question the validity of respondent's waiver.

Even if the Court were to conclude, contrary to our submission, that a colloquy also may provide a defendant with sufficient information about mitigation evidence to allow an effective waiver, the colloquy here on its face did not provide sufficient evidence to satisfy that standard. The record does not come close to establishing that respondent understood the importance of mitigation evidence and how it could affect his punishment. The record does not demonstrate that respondent even comprehended his right to have mitigation evidence presented. Nor does it show his understanding of the wide range of possible evidence – beyond the testimony of his family members – that might have been available for presentation on his behalf. Indeed, the colloquy provided respondent with far less information than a number of State courts require for an effective waiver.[33] Under this approach

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[33] See, *e.g.*, *Wallace* v. *State*, 893 P.2d 504, 512-513 (Ok. Crim. App. Ct. 1995) (establishing a detailed seven-point set of procedures to confirm an effective waiver of presentation of mitigation evidence); *Koon* v. *Dugger*, 619 So.2d 246, 250 (Fla. 1993) (requiring counsel to explain on the record the potential mitigation evidence that could be presented and that he has discussed the matter fully with the defendant, thereby establishing a complete record of defendant's waiver); *Zagorski*, 983 S.W.2d at 660 (requiring "determination on the record whether the defendant understands this right and the importance of presenting mitigation evidence" and inquiring "of both the defendant and counsel whether they have discussed the importance of mitigation evidence, the risks of

too, therefore, the case should be remanded for an evidentiary hearing.[34]

B. Respondent's Showing Of Prejudice Also Is Sufficient To Require An Evidentiary Hearing.

This Court should not disturb the Ninth Circuit's conclusion that respondent also is entitled to an evidentiary hearing to determine whether he can establish a "reasonable probability" that his counsel was so ineffective as "to undermine confidence in the outcome" of the hearing. *Strickland*, 466 U.S. at 694.

The prejudice element of *Strickland* plays a key role in determining the extent of the deterrent effect of post-trial ineffective assistance claims. To the extent the prejudice bar is set high, it insulates inadequate representation against attack and lessens the deterrent effect. To the extent it is set too

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foregoing the use of such evidence, and the possibility that such evidence could be used to offset aggravating circumstances").

[34] Petitioner refers in passing to "clearly established law" (Br. 27), apparently in an attempt to argue that federal habeas relief is precluded by 28 U.S.C. § 2254(d)(1). That contention is plainly wrong. All of the legal principles relevant to respondent's claim are clearly established: the requirements for an effective waiver of constitutional protections applicable to criminal defendants (in *Zerbst* and subsequent decisions); the standard for ineffective assistance of counsel (in *Strickland*); and the potential effect of ineffective assistance on waiver decisions (in *Hill*).

This case is therefore entirely different from *Carey* v. *Musladin*, No. 05-785 (Dec. 11, 2006), where this Court had articulated a standard for potentially prejudicial "state sponsored courtroom practices" but had "never applied that test to spectators' conduct." Slip op. 5. The Court further observed that "part of [that] legal test * * * suggests that [it applies] * * * only to state-sponsored practices." *Ibid.* Rather, the situation here is identical to the one in *Wiggins*, in which the Court observed that because it previously had identified the *Strickland* standard it could grant relief based on misapplication of that standard. *Wiggins*, 539 U.S. at 520-22.

low, it may promote excessive post-trial litigation. Given the realities of legal assistance to capital defendants discussed above, the Court should take care not to set the prejudice bar too high, thereby insulating against attack – based on a necessarily speculative standard – errors that might have affected the outcome of the trial.

In reaching its conclusion, the Ninth Circuit had, by its own account, a "significant amount" of mitigation evidence to work with. Pet. App. A19. Counsel's anemic investigation had failed to unearth and present a number of mitigating factors that weighed against a death sentence. That evidence included proof of respondent's "organic brain dysfunction," his exposure to alcohol and drugs in utero, his abandonment by his birth parents, his biological family's history of violence, and his own potential genetic predisposition to violence.[35] All of this evidence supports the conclusion that, as one medical expert who examined respondent put it:

> [Respondent's] actions did not constitute a lifestyle choice in the sense of an individual operating with a large degree of freedom, as we have come to define free will. The inherited, prenatal, and early developmental factors severely impaired [his] ability to function in a society that expects individuals to operate in an organized and adaptive manner, taking into account the actions and consequences of their behaviors and their impact on society and its individual members.

[35] Pet. App. A18-A19. This evidence goes far beyond the narrow claims of Anti-Social Personality Disorder (APD) discussed in petitioner's brief. Pet. Br. 24-25. According to petitioner, APD is merely a description of conduct, and hence is not mitigating. By contrast, the type of genetic, biological and other evidence cited by the Ninth Circuit as mitigating went far beyond merely describing respondent's conduct, and was in fact an assessment of his culpability, because it referenced factors beyond respondent's control. See Pet. App. A19.

J.A. 160 (declaration of Thomas C. Thompson). While respondent may have been legally guilty of murder, this is substantial evidence that he may not have been so morally culpable as to deserve the death penalty.

Petitioner claims (Br. 24) that respondent's evidence "is only marginally – if at all – mitigating," and in fact "simply confirms that Landrigan is a violent sociopath." That is not true. Nine of the eleven judges on the Ninth Circuit en banc panel found that these factors were "the very sort of mitigating evidence that 'might well have influenced the [judge's] appraisal of [respondent's] moral culpability'" (Pet. App. A19) and that respondent therefore deserved an evidentiary hearing to substantiate his claims. This lopsided majority included one judge who had actually ruled against respondent's ineffective assistance claim in the initial panel decision. The fact that so many judges agreed on the issue of prejudice is powerful evidence that the mitigating factors deserve further exploration in an evidentiary hearing.

The Ninth Circuit's determination of prejudice is supported by empirical research examining how sentencing decisions typically are affected by mitigation evidence similar to that available here. *Strickland* requires a court to hypothesize how sentencing decision makers would respond to various types of mitigation evidence. It therefore makes sense to take account of such research, which provides evidence of how Americans actually balance their general support for capital punishment with their desire to do justice in light of individual circumstances.

In recent years, a series of studies have examined the attitudes of real-life capital jurors, mock capital jurors, and ordinary American citizens concerning the death penalty. A special focus of this research has been assessing how support for capital punishment changes in the presence of specific types of mitigation evidence. While none of the studies tested the precise set of mitigating circumstances at issue here, the studies clearly establish that similar types of evi-

dence lead large numbers of capital-punishment supporters to oppose imposition of death sentences in specific cases. Even though a judge rather than a jury imposed the respondent's sentence, these studies provide instructive information about the test under *Strickland* – how a reasonable fact-finder would weigh particular types of mitigation evidence

One study of 153 actual capital jurors pulled from 41 different cases presented the participants with a series of potential mitigating circumstances and asked whether each circumstance would have made them "much more," "slightly more," "just as," "slightly less," or "much less" likely to vote to impose the death penalty.[36] Overall, 27% of jurors would have been "much less" likely to hand down a death sentence to a defendant with a history of mental illness;[37] 25% would have been "much less" likely to execute a defendant suffering from extreme mental and emotional disturbance;[38] 20% would have been "much less" likely to impose death on a defendant who had spent time in institutions "but was never given any real help;"[39] and 10% would have been "much less" likely to impose death on a defendant who had suffered serious abuse as a child.[40] If the "much less" and "slightly less" categories of response are aggregated, 56%, 55%, 48%,

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[36] Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1540-41 & 1551 (1998). For an explanation of the Capital Jury Project and an explanation of the relevance of these studies for judicial determinations, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L. J. 1043, 1059-62 (1994-1995).

[37] Garvey, *supra* note 36, at 1559.

[38] *Id.* at 1555.

[39] *Id.* at 1559.

[40] *Id.* at 1559.

and 37% of jurors would have been less likely to impose a death sentence under each circumstance, respectively.[41]

These findings are confirmed by a 2004 study of 260 "mock jurors" conducted by researchers at the University of Alabama.[42] Each juror was presented with paragraph-long vignettes describing different murder scenarios and providing short background information on the killer; they then were asked to sentence each defendant either to death or to life imprisonment. In the three "control" vignettes, in which no mitigating circumstances were present, the mock jurors voted in favor of death by the overwhelming margins of 87%, 82%, and 77%, respectively.[43] Support for the death penalty plummeted, however, when the vignettes included mitigation evidence suggesting that the defendant, while guilty of the crime, nonetheless was not fully culpable. For example, only 7% of jurors imposed death when the defendant was suffering from schizophrenia; only 29% did so when the defendant was "borderline retarded"; and only 45% favored death when the defendant had suffered severe verbal and physical abuse by his parents.[44]

Finally, the significant impact of mitigation evidence similar to the types of evidence at issue here has also been documented in public opinion surveys. According to a Gallup Poll conducted in May 2002, 72% of Americans sup-

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[41] *Id.* at 1555, 1559.

[42] Michelle E. Barnett, Stanley L. Brodsky, & Cali Manning Davis, *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 Behav. Sci. & Law 751 (2004); see generally Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase: Legal Assumptions, Empirical Findings, and a Research Agenda*, 16 Law and Hum. Behav. 185, 190 (1992).

[43] Barnett et al., *supra* note 42, at 761.

[44] *Ibid.*

port the death penalty in general.[45] Only 19%, however, support executing murderers who are mentally ill – and only 13% support executing the mentally retarded.[46] A similar poll from June 1997 found that 80% of Americans overall support the death penalty, with only 16% in opposition.[47] For defendants severely abused in their childhood, however, that opposition rose to 41%.[48] Likewise, a poll from November 1995 found 78% for capital punishment overall[49] – but only 48% for defendants abused as children,[50] and only 9% for those who were mentally retarded.[51]

These studies demonstrate that when, as here, there is evidence that the defendant's criminal behavior is shaped by factors outside his control, support for imposition of the death penalty drops precipitously. That is true even among individuals who generally support capital punishment.

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[45] Gallup Organization, *Question Number: 009*, Public Opinion Online (May 21, 2002), *available at* I exis ACC-NO: 0404089.

[46] Gallup Organization, *Question Number: 013*, Public Opinion Online (May 21, 2002), *available at* Lexis ACC-NO: 0404093; Gallup Organization, *Question Number: 014*, Public Opinion Online (May 21, 2002), *available at* Lexis ACC-NO: 0404094.

[47] Princeton Survey Research Associates, *Question Number: 003*, Public Opinion Online (June 7, 1997), *available at* Lexis ACC-NO: 0280513.

[48] Princeton Survey Research Associates, *Question Number: 005*, Public Opinion Online (June 7, 1997), *available at* Lexis ACC-NO: 0280515.

[49] Princeton Survey Research Associates, *Question Number: 007*, Public Opinion Online (November 1995), *available at* Lexis ACC-NO: 0247880.

[50] Princeton Survey Research Associates, *Question Number: 009*, Public Opinion Online (November 1995), *available at* Lexis ACC-NO: 0247882.

[51] Princeton Survey Research Associates, *Question Number: 016*, Public Opinion Online (November 1995), *available at* Lexis ACC-NO: 0247889.

These findings support the conclusion of the nine judges below that there is a "reasonable probability" that the sentencing determination in this case would have been different if this information had been available. Certainly there can be no question that respondent has adduced sufficient evidence to require an evidentiary hearing on that question.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

GIOVANNA SHAY
CHRISTOPHER LASCH
Yale Law School
Supreme Court Advocacy Clinic
127 Wall Street
New Haven, CT 06511
(203)432-4800

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

PAMELA HARRIS
NACDL Amicus Committee
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

Counsel for Amicus Curiae

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